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IN THE

Supreme Court of the United States

No. ~~1416~~ 185

..... Term, 1967

JOHN P. COYNE, Administrator of the Estate of Donald William Powell, Sr., deceased,
Petitioner,

v.

JOHN MOHR & SONS, INC., a corporation,
Respondent,

v.

UNITED STATES STEEL CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWARD J. BALZARINI, ESQUIRE,
JOSEPH W. CONWAY, ESQUIRE,
SUTO, POWER, BALZARINI & WALSH,
3113 Grant Building,
Pittsburgh, Pennsylvania 15219,
Attorneys for Petitioner.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
3083 GARLYN DRIVE, PITTSBURGH, PA., 15235
412-831-7469

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UNITED STATES STEEL CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 3, 1967.

Opinions Below

The opinion of the United States District Court for the Western District of Pennsylvania (App. A, *infra*, pp. 9-22) was not reported. The opinion of the Court of Appeals (App. B, *infra*, pp. 23-29) is reported at 372 F. 2d 36.

Jurisdiction

The judgment of the Court of Appeals (App. C, *infra*, pp. 30-31) was entered on February 3, 1967. Petitioner filed a Petition for Rehearing on February 17, 1967 which was denied by the Court of Appeals on March 13, 1967 (App. D, *infra*, pp. 32-33). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

Questions Presented

I. Whether the Court of Appeals erred as a matter of law in holding that a contractual provision requiring respondent to "furnish, install and later remove all temporary roads used during construction" imposed upon respondent such obligation only in regard to "roadways required in connection with construction assigned to [respondent]"?

II. Whether the Court of Appeals erred as a matter of law in holding that a contractual provision requiring respondent to provide for the safety of "any other person who enters upon Owner's [United States Steel Corporation] premises for reasons relating to this contract [between respondent and United States Steel Corporation]" merely imposed upon respondent the duty "to provide for the safety of all persons who are on the premises to engage in activity assigned to [respondent]"?

III. Whether the Court of Appeals invaded the province of the jury in finding that the decedent was engaged in work assigned to United States Steel Corporation, when the jury's verdict was necessarily based upon a finding of fact to the contrary?

Statement

John P. Coyne, as Administrator of the Estate of Donald William Powell, Sr., deceased, brought a diversity action against John Mohr & Sons, Inc. ("respondent"), a corporation, seeking to recover damages, on behalf of the decedent's estate and his surviving widow and three minor children, for the decedent's wrongful death which occurred while he was employed by United States Steel Corporation ("Steel"). Steel was joined as a third-party defendant.

Steel had entered into a written construction contract ("contract") with respondent by the terms of which respondent undertook to design, furnish and erect a blast furnace with all its auxiliaries ("blast furnace") for Steel on its premises.

The contract imposed broad safety responsibilities on respondent by virtue of the following provisions, *inter alia:*

> "RESPONSIBILITY FOR SAFETY OF PERSONS AND PROPERTY
>
> 16. The safety of all persons employed by contractor [Respondent] and his subcontractors on Owner's [Steel] premises, or any other person who enters upon Owner's [Steel] premises for reasons relating to this contract shall be the sole responsibility of Contractor [Respondent]. * * *
>
> Contractor [Respondent] shall take all reasonable measures and precautions at all times to prevent injuries to or the death of any of his employees or any other person who enters upon Owner's [Steel] premises. Such measures and precautions shall include, but shall not be limited to, all safeguards and warnings necessary to protect workmen and others against any conditions on Owner's [Steel] premises which could be dangerous and to prevent accidents of any kind whenever work is being performed in proximity to any moving or operating machinery, equipment or facilities wheth-

or such machinery, equipment or facilities are the property of or are being operated by, the Contractor [Respondent], his subcontractors, the Owner [Steel] or other persons.

It is understood that if employees of Owner [Steel] shall perform any acts for the purpose of discharging the responsibility undertaken by the Contractor [Respondent] in this Article 16, whether requested to perform such acts by the Contractor [Respondent] or not, such employees of the Owner [Steel] while performing such acts shall be considered the agents and servants of the Contractor [Respondent] subject to the exclusive control of the Contractor [Respondent]."

The contract provided further that the duties assumed in this section extended to Steel's employees. The specifications which were a part of the contract provided, *inter alia:*

"*Work by Contractor* [*Respondent*]

26. The Contractor [Respondent] shall: * * *
26.5 Furnish, install and later remove all
26.5.1 Temporary roads required for use during construction"

* * *

"26.9 * * * handle * * * all materials * * *"

* * *

"26.12. Provide, maintain and later remove all required * * * bracing, planks * * * and everything necessary for the safe and proper conduct of the work and for the protection of * * * Purchaser's [Steel] employees * * *"

* * *

"26.13 Be responsible for transportation of equipment over plant roads * * *"

* * *

"*Work by Purchaser* [*Steel*]

1. The Purchaser [Steel] will perform the following: * * *"

* * *

"1.15 Furnish all materials and install all roadways including subgrade for same. (Except temporary roads including subgrade, required during construction which shall be provided by Contractor [Respondent]".

In the same specifications, Steel undertook the obligation of completing certain work with its own employees who were attached to its American Bridge Division ("Bridge") and under a purchase order with Bridge which did not include any provision whereby safety responsibilities were assigned to Bridge. .

After the work was begun but prior to the decedent's accident, there were two accidents involving cranes and the same overhead, high-voltage electrical wires subsequently involved in the decedent's accident. Consequently, on March 6, 1962, the Chief Engineer of Steel directed a letter to respondent's superintendent. This letter suggested safety procedures to be followed in the vicinity of the blast furnace. The superintendent admitted that he received a copy of the letter and that he had knowledge of these two accidents involving the same wires prior to the decedent's accident. These safety procedures suggested that a man be specifically assigned to watch the wires whenever a boom in excess of 104 feet was used in the vicinity of the wires. Further, if the boom was to be used at a distance closer than 20 feet to the wires, the superintendent acting for respondent should request Steel's construction engineer to shut off the power. In the event the power could not be shut off, special procedures were set forth to assure safe operation of the equipment. Other applicable safety regulations required that, if possible, all interfering wires be relocated during construction.

Approximately one week prior to the decedent's accident, Bridge found it necessary to move a crawler-type crane through a slag pit located to the west of the blast furnace.

This pit was an auxiliary part of the blast furnace and its construction was respondent's contractual obligation. Because the ground through the base of the slag pit was soft and muddy, it was necessary to construct a temporary roadway to facilitate movement of the crane across the pit.

Respondent's contractual duty to build this temporary roadway was performed by Bridge's employees who constructed the roadway from wooden mats weighing approximately 2½ tons each. The mats were laid across the slag pit with the use of a crane.

After the temporary roadway was built, respondent's superintendent requested that a section of the roadway located at the southern entrance of the slag pit be removed in order to permit respondent's personnel to excavate and to install a french drain in the pit. Pursuant to this request, the mats were removed by a Bridge crew. At that time the original purpose for which the temporary roadway had been built was not yet accomplished, *i.e.*, the crawler-type crane had not been moved through the slag pit. After the removal of the mats, respondent's personnel performed excavation work and installed a french drain at the southern entrance to the slag pit.

At approximately 10:00 o'clock A. M. on August 21, 1962, a Bridge crew using a crawler-type crane began installing the temporary roadway in the area where respondent's personnel had excavated and installed the french drain. This crew consisted of a foreman, a crane operator, a "pusher" and two hook-up men and was supervised by the Bridge foreman. One of the hook-up men was the decedent who was then working his second day on the job. The decedent and the other hook-up man had not been warned of the presence of high-voltage current in the wires located 104

feet above the working area or of the danger of arcing electricity.

During the morning of August 21, 1962, respondent's superintendent observed the crane with its boom adjacent to the wires. There were no targets in the ground at this time; on previous occasions when respondent's personnel were using a crane beneath the same wires, its superintendent had put targets in the ground to assist the crane operator. The mats were lifted from an adjoining bank into the slag pit by the use of a cable attached to the boom of the crane and were moved by swinging the boom. The hook-up men would unhook the crane line from the mat as it was laid in place.

At approximately 1:00 o'clock P. M., the decedent suffered a fatal electric shock while unhooking the crane line; electricity arced a distance of 11 feet from the uninsulated, overhead high-tension wires to the line.

A labor foreman of respondent was within 40 to 60 feet of the accident site at the time the accident happened. A carpenter foreman of respondent was standing directly in front of the crane at the time the decedent was electrocuted; he knew that the wires were energized and that there had been two prior accidents involving cranes and the same wires.

The jury returned a verdict in favor of the plaintiff in the sum of $95,000.00 and the District Court entered judgment thereon. The Court of Appeals reversed the judgment of the District Court with instructions to the District Court to enter judgment for respondent.

Reasons for Granting the Writ

The holding of the Court of Appeals ignores the plain and clear language of the contract by holding that respondent owed no duties to the decedent.

On the merits of the issues presented we are in full accord with the analysis and views of the Court of Appeals for the Seventh Circuit, expressed in the case of *Farmers State Bank of Valparaiso v. Dravo Corp.*, 321 F. 2d 38 (7th Cir. 1963), which case is incorrectly cited as supporting authority by the Court of Appeals for the Third Circuit. In that case the Court stated that recovery would be allowed to those "whose presence is incidental to or attributable to the performance of the work contracted to be done or furnished by [the contractor] * * *". *Farmers State Bank of Valparaiso v. Dravo Corp., supra* at 41. In view of the direct conflict between the Courts of Appeal for the Seventh Circuit and Third Circuit on the question presented we believe that review by this Court is plainly warranted.

The jury's verdict for the plaintiff was necessarily based upon a finding of fact that, at the time the decedent met his death, he was engaged in work relating to respondent's contractual obligations. The action of the Court of Appeals in entering judgment for respondent necessarily involved a finding of fact that the decedent met his death while performing work assigned to Steel. Such a finding of fact is contrary to the language of the contract and is a clear invasion of the jury's province as a fact-finding body.

Conclusion

For the reasons stated, the Petition for Certiorari in this case should be granted.

Respectfully submitted,

EDWARD J. BALZARINI, ESQUIRE,
JOSEPH W. CONWAY, ESQUIRE,
Attorneys for Petitioner.

Appendix A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN P. COYNE, Administrator of the Estate of Donald William Powell, Jr., deceased,

Plaintiff,

v.

JOHN MOHR & SONS, INC., a corp.,

Defendant & Third Party Plaintiff,

v.

UNITED STATES STEEL CORPORATION,

Third Party Defendant.

C. A. No. 63-333.

OPINION ON DEFENDANT'S MOTION FOR JUDGMENT *N. O. V.* AND FOR A NEW TRIAL.

WILLSON, *J., District Judge:*

In this civil action tried to a jury, a verdict was returned in plaintiff's favor awarding damages to plaintiff in the total sum of $95,000. The case is under the diversity jurisdiction. Plaintiff's decedent, 34 years of age, was electrocuted on August 21, 1962, while working as an employee of the American Bridge Division of the United States Steel Corporation.

On September 20, 1960, Steel entered into a written contract with defendant John Mohr & Sons, Inc., hereinafter referred to as Mohr under which Mohr undertook to design, to furnish and to erect blast furnace No. 6 complete with all auxiliaries at Steel's Duquesne Works. The contract documents which were admitted into evidence consist of the Construction Contract, Plaintiff's Exhibit 1A, and Specification No. 4334-A, which referred to Paragraph 1 of the contract and thereby made a part thereof. The contract imposed specific safety responsibilities on Mohr in broad language which in part reads as follows:

> "RESPONSIBILITIES FOR SAFETY OF PERSONS AND PROPERTY
>
> 16. The safety of all persons employed by Contractor and his subcontractors on Owner's premises, or any other person who enters upon Owner's premises for reasons relating to this contract, shall be the sole responsibility of Contractor . . ..
>
> Contractor shall take all reasonable measures and precautions at all times to prevent injuries to or the death of any of his employees or any other person who enters upon Owner's premises. Such measures and precautions shall include, but shall not be limited to, all safeguards and warnings necessary to protect workmen and others against any conditions on Owner's premises which could be dangerous and to prevent accidents of any kind whenever work is being performed in proximity to any moving or operating machinery, equipment or facilities, whether such machinery, equipment or facilities are the property of or are being operated by, the Contractor, his subcontractors, the Owner or other persons."

In these specifications *inter alia* appeared the following:

> "26. The Contractor shall:
>
> 26.12 Provide . . . everything necessary for the safe and proper conduct of the work and

> for the protection of all equipment, property, Contractor's employees, Purchaser's [Steel's] employees and all others."

In the contract and specifications, Steel is variously identified as Owner or Purchaser. Paragraph 20 of the contract required Mohr and its subcontractors to cooperate with the owner and other contractors on the premises. All of the work had not been let to Mohr. John Moore, Construction Engineer for Steel, testified that Mohr had 60 per cent of the job; Ragnar Benson had contracted directly with Steel for 15 per cent of the work which was largely foundations, and Steel had issued what it called purchase orders to its American Bridge Division for some 25 per cent of the work. Other small contractors had the balance of the work. During the course of construction, safety meetings were regularly held and attended by representatives of all the firms on the job. At one meeting at least 8 representatives were in attendance (Tr. 55-57).

The jury has accepted plaintiff's evidence as to liability, and under this evidence the jury could have found the following factual situation:

By August 21, 1962, the date of the accident, construction of the blast furnace and auxiliaries was well along toward completion. Steel had reserved for itself the construction of a bag filterhouse, the purpose of which was to contain equipment to remove and collect dust and other particles from ore being fed into the furnace. A slag pit, 60 x 150 feet, the purpose of which was to be used to collect and solidify molten slag in the iron smelting process, had been excavated, probably by Ragnar-Benson. Under Mohr's contract, it was required to install piping, catchbasins, and drains for the slag quenching system in the slag pit. In building the filterhouse, it was necessary for Steel acting

with American Bridge personnel to move across the slag pit in a tractor-type mobile crane to the filterhouse area. Since the bottom of the slag pit was uneven and muddy, a ramp consisting of wooden mats, some 4 x 20 feet in size and weighing 2½ tons each, was laid down into the slag pit over which American Bridge expected to move a "3900" crane to the filterhouse. The mats being heavy and unwieldy, it was necessary to move them by crane; and for this purpose a smaller "3500" crane with an 80 foot boom was used by American Bridge in constructing the ramp across the slag pit. The laying of the ramp was completed by American Bridge by Saturday, August 18th, according to the recollection of the witnesses.

Sometime after the ramp had been completed by American Bridge, Bernard Conway, Mohr's superintendent, requested John Moore, Steel's superintendent, to have the mats at the southerly entrance of the pit removed in order to permit Mohr to install french drains in that portion of the slag pit. It should be emphasized at this point that what just has been stated with regard to a request from Mr. Conway, defendant's superintendent, to John Moore, Steel's superintendent, is in some respects a conclusion based on inferences from what various witnesses stated and from records reviewed. In any event, on Monday morning, August 20, 1962, the mats at the southerly end of the pit were taken away by American Bridge men and with the use of a "3500" crane with an 80 foot boom. What next occurred on that end of the slag pit is the subject of sharp controversy in the testimony. Plaintiff's witnesses tended to prove that Mohr dug or moved dirt and installed french drains in that portion of the pit where the mats had been removed. Some of this evidence came from Mohr personnel and also from Steel personnel. By Tuesday,

August 21st, this work at the pit had been completed by Mohr; and American Bridge then commenced to replace the mats, which amounted to partially rebuilding the ramp roadway. However, when the work commenced on Tuesday, rather than use the "3500" crane with the 80 foot boom, American Bridge used the "3900" crane with a 120 foot boom. Above the area where the crane was working, high-tension power lines were located at a height of 104 feet. According to the crane operator, the boom could have been shortened, but it was not. Decedent was a "hooker", in that it was his job to connect or disconnect the hook on the crane cable to or from the ring on his side of the wooden mat. While he was disconnecting the hook from the last mat to be laid, decedent met his death when current from the high-tension lines arced to the boom and ran down the cable, electrocuting him. Measurements taken after the accident showed that the boom had approached to within 11 feet of the power line.

The sharp controversy at the trial was whether what was being done by American Bridge personnel at the time of the accident "related to Mohr's obligation under the contract." Plaintiff's counsel in his statement of the issues in the case says in his brief:

> "I. WHETHER THE COURT'S INTERPRETATION OF THE CONTRACT DOCUMENTS WAS ERRONEOUS AS A MATTER OF LAW WHERE THE COURT HELD THAT, BY THE TERMS OF THE CONTRACT, MOHR HAD ASSUMED A DUTY TO PROVIDE FOR THE SAFETY OF STEEL'S EMPLOYEES, IF STEEL'S EMPLOYEES WERE ENGAGED IN WORK RELATING TO MOHR'S OBLIGATION UNDER THIS CONTRACT?"

During the course of the trial and post-trial, Mr. Rhodes for the defendant has contended that the issues in this case

are similar to those decided by the United States Court of Appeals for the Seventh Circuit in *Farmers State Bank of Valparaiso v. Dravo Corporation*, 321 F. 2d 38, decided on July 9, 1963. In that case the Court of Appeals affirmed the District Court in concluding that as a matter of law there was no evidence to support the verdict for the plaintiff. It is believed that the controlling sentence in the decision is found on page 41 where the Court says—"We find no basis for a construction of the contract which would result in Dravo's warranting U. S. Steel against Steel's own unlawful act, negligence or default."

It should be conceded that if the instant contract between Steel and Mohr—as well as the work being performed—is not distinguishable from Dravo's contract with Steel in the cited decision, then defendant should have judgment *n. o. v.* in this case. But as the trial Judge I concluded that this case had many distinguishing features not found in the Dravo-Steel contract. Also in that case the work being done at the time of the accident was work reserved to Steel under its Dravo contract and was for Steel's benefit only, and there was no issue raised that Steel was doing work relating to Dravo's contract. The latter point is the essential difference in the two cases, and it is also the crux of the instant issue.

At this point the Court has in mind that the jury verdict favored plaintiff. This fact results in the application of well known principles. See *Downey v. Union Paving Co.* (3rd Cir. 1949), 184 F. 2d 481, 484, where the language approved and quoted is—"On a motion for judgment *n. o. v.*, the testimony should not only be read in the light most advantageous to plaintiff, all conflicts therein being resolved in his favor, but he must be given the benefit of every fact and inference of fact pertaining to the issues involved which

may reasonably be deduced from the evidence." It is noticed also that this principle was applied by the Seventh Circuit Court of Appeals in the cited case in reaching a decision contrary to the decision of this Court.

In the first place, the contract between Steel and Mohr, as shown by the evidence, is unambiguous. Both sides seem to agree on this fact, but defendant says that the Court misconstrued it and misapplied it. If so, then the case has been incorrectly decided. But the contract is to be construed by the Court. See *Jamison v. A. M. Byers Company*, 330 F. 2d 657 (1964).

As indicated there was considerable testimony and sharp controversy during the course of the trial as to why it was necessary to remove and then relay the mat ramp or roadway. No doubt plaintiff is entitled to have this evidence stated in the light most favorable to him as his counsel has done in his brief. As trial Judge I have reviewed this evidence and it seems to me that the jury could find the facts as urged by plaintiff on this crucial portion of the case. Mr. Balzarini summarized the record as follows:—"After the roadway was built, Bernard Conway, Mohr's superintendent, requested that the mats installed at the southerly entrance of the pit be removed in order to permit Mohr personnel to install french drains in the slag pit (Tr. 117). Pursuant to this request, the mats were removed by a Steel crew solely to enable Mohr personnel to perform work relating to Mohr's obligation under the contract, *i.e.*, the installation of french drains (Tr. 69, 70, 72, 170). At the time of the removal, the original purpose for which the mats had been installed had not been accomplished (Tr. 103). After the removal of the mats, Mohr personnel performed excavation work and installed a french drain at the southern entrance of the

slag pit (Tr. 127, 128, 158, 170)." Plaintiff also contends and it is believed that the evidence supports counsel's contention where he states—"Much of the work on the blast furnace had been completed prior to decedent's accident. A bridge crew working on the blast furnace had taken instructions and directions from Mohr supervisory personnel with reference to such work (Tr. 160). Also the foreman in charge of the decedent's crew at the time of the accident had personally received instructions from Mohr personnel with regard to work which his crew was performing on the blast furnace (Tr. 160, 162, 163).

"Because there had been two prior accidents involving cranes and the same overhead electrical wire, the Chief Engineer of Steel's Duquesne Works directed a letter to Bernard Conway on March 6, 1962. This letter outlined the safety procedure to be followed in using cranes in the vicinity of this particular high-voltage wire (Tr. 60, 62). Conway admitted that he received a copy of that letter and that he had knowledge of the two prior accidents (Tr. 370, 371).

"On the morning of August 21, 1962, a Steel crew began relaying the mats in the area where Mohr personnel had excavated. Due to the nature of the backfilling done by Mohr's excavators, the condition of the ground in the area made relaying of the mats difficult. As the mats were set in place, one was higher than the other and several had to be removed in order to permit levelling of the ground affected by the excavation (Tr. 129, 133, 134, 158, 159). High-tension wires ran 104 feet above "the ground and over the southerly entrance to the slag pit in the exact area where Mohr excavated (Tr. 132). In order to remove or replace the mats, the Steel crew had to place the crane and its boom in close proximity to the high-tension wires (Tr.

211, 212). The Steel crew consisted of a crane operator, a foreman, and two hook-up men, one of whom was the decedent (Tr. 130). The decedent's fatal accident occurred as he was unhooking a mat which was being relaid across the area which Mohr had excavated (Tr. 39, 130, 133).

"The crew began relaying the mats at approximately 10:00 o'clock A. M. on the day of the accident, which occurred shortly after lunch (Tr. 212, 213). It was decedent's second day on the job and neither he nor his co-hook-up man had been warned that there was a high-voltage current in the uninsulated overhead wires (Tr. 221, 226, 227). The mats were lifted from the bank into the pit by the use of a cable attached to the 120-foot crane boom and were moved by swinging the boom (Tr. 224). The crane operator took his instructions on movements from the foreman. After the mats were laid in place, the hook-up men would "unhook the crane line from the mat (Tr. 130, 224). The decedent suffered a fatal electric shock while in the act of unhooking the crane line from a mat which had been placed (Tr. 133). Electricity arced from the uninsulated overhead high-tension wire to the crane boom, a distance of 11 feet (Tr. 185).

"On the morning of the accident, Conway observed the crane with its 120-foot boom being operated adjacent to the uninsulated wire (Tr. 213, 357). A Mohr carpenter foreman who was standing directly in front of the crane at the exact time that the decedent was electrocuted (Tr. 313) also knew that the wires were energized and that there had been the prior accidents involving cranes and the same wires (Tr. 322, 323). In order to prevent a crane from contacting the wires when *Mohr* personnel were working around them, Conway had targets put in the ground in the vicinity of the high-tension wires (Tr. 322). There were no

such targets in the ground on the day the decedent was killed (Tr. 322). Further, a Mohr labor foreman was within 40 to 60 feet of the accident site at the time the accident happened (Tr. 328). The manner of the crane's operation observed by these Mohr supervisory employees on the morning of August 21, 1962, clearly violated the safety procedure outlined in Steel's letter of March 6, 1962 (Tr. 95, 96).

"Mohr failed to warn the decedent of the danger of arcing and that the wires were high-tension and energized. Further, it made no attempt to have Steel supervisory personnel comply with the safety procedures outlined in Steel's letter of March 6, 1962 (Tr. 106, 221, 226, 227). Although Conway conceded that the mats were being moved for a reason relating to Mohr's obligation under the contract (Tr. 374). Mohr made no complaint that the work was being performed in an unsafe manner (Tr. 106). Even after Mohr's various supervisory personnel observed the mats being moved in an unsafe manner, Mohr made no request that the work be stopped, that the power be turned off, that the lines be relocated or that the lines be protected. Mohr failed to advise the proper Steel supervisory personnel that the mats were located directly beneath the high-voltage wire (Tr. 106, 226)."

During the trial defendant strongly resisted the introduction of evidence tending to show a request came from defendant's supervisory personnel to American Bridge to move the mats in order for Mohr to complete its work in the slag pit area. But it seems to the Court that since the jury verdict, Mr. Rhodes in his brief has conceded that the evidence supports a finding in plaintiff's favor in this phase of the case. But Mr. Rhodes in his brief also summarizes his contention as follows:

> "At the time of the accident, with respect to laying and relaying of the mats, all of the work was under the sole direction, supervision and control of Steel, all persons involved in the work were Steel employees; all equipment used in the work was owned by Steel; and the work being done at the time of the accident was work reserved solely to Steel under the contracts; the premises including the overhead wires were owned and controlled by Steel."

But the statement by counsel for defendant just mentioned overlooks the fact that the mats had been laid by American Bridge and were in their proper position for the movement of the "3900" crane across the slag pit area to the filterhouse when the request to remove them came from Mr. Conway to Mr. John Moore of Steel. Thus, the work that American Bridge was doing in moving the mats at least was not for its benefit, but for the benefit of Mohr. The parties contemplated in the agreement that at times Steel personnel would be doing work for Mohr. For instance, the contract in the last sentence of Section 16 says:

> "It is understood that if employees of Owner shall perform any acts for the purpose of discharging the responsibility undertaken by the Contractor in this Article 16, whether requested to perform such acts by the Contractor or not, such employees of the Owner while performing such acts shall be considered the agents and servants of the Contractor subject to the exclusive control of the Contractor."

The evidence is clear that in removing and replacing the mats, as asserted by Mr. Rhodes, the work was under the sole direction, supervision, and control of Steel. This fact is not disputed. What plaintiff contends on this point is that Mohr under its safety obligation had a duty to warn American Bridge personnel of the proximity of the boom to the high tension line because the work was not Steel's business, but was work related to Mohr's contract. As this Court sees it, that is the crux of plaintiff's case, and

when all the evidence is recited and the law is discussed, it comes down to the simple proposition whether under the circumstances Mohr can be held responsible for its failure to give any warning or advice whatsoever with regard to a situation known to its personnel on the job to be dangerous. The jury answered this proposition in the affirmative, and it is believed that there was a factual jury issue in the evidence relating to this point. The doing of a certain act or failure to do one may not in every case be a proximate cause of an accident, but is a duty which if one is obligated to perform and does not perform may impose liability. Generally such a duty arises by law, but it may be imposed by contract as in the instant case.

It is believed in this case that the Court's instruction to the jury on whether the work being done at the time of the accident related to Mohr's contract is sufficiently clear and accurate with the result that the jury fully understood the issue. For instance at page 540 the instruction to the jury was:

> "Again, I want to point out, members of the jury, in this contract the Defendant Mohr assumed responsibility—sole responsibility—for the safety for anything relating to his contract. I am not saying to you that he was or was not negligent because he failed to do something or because he failed to give a warning. That is what the jury has to find. First, you will find whether or not this work related to the contract and then determine whether Mohr, by not doing anything, was guilty of any negligence which was a proximate cause."

Defendant's theory is that it must have had control of the work in progress at the time of the accident to be held liable. This is believed a misconception of the terms of the contract. Control was not necessary in this Court's view under the safety provisions imposed upon defendant.

It also follows, says defendant, that control of the work in progress at the time of the accident would make decedent defendant's statutory employee under 77 Purdon's Pennsylvania Statutes—Employer's Liability, § 52, and that the issue as to control was a jury issue and should have been left to the jury, but was not. The answer to that contention is that plaintiff concedes that defendant was not in control of the work at the time of the accident [See plaintiff's brief, page 19]. American Bridge was in control. Thus, there is no question of statutory employee relationship between decedent and defendant. See *Hayes v. Philadelphia Transportation Company,* 312 F. 2d 522 (1963). That being so, there was no jury issue on this phase of the case, and none was left to the jury. This is the subject matter of defendant's third "Statement of Issues." It is believed, however, that there was no error in not submitting the issue of control to the jury.

Other issues raised by defendant have been considered, but in the view of this Court are not of any significance. For instance, defendant complains that the issue of contributory negligence of decedent was not left to the jury. The answer to that is that decedent as a boilermaker was untrained at the job he was doing at the time he was killed. The evidence was that he was in the pit and out of sight of the boom of the crane. With the presumption which ran in his favor, there was simply no jury issue as to contributory negligence.

Defendant's motion for a new trial has been considered. The case as presented and herein reviewed appears to be one for judgment *n. o. v.* or the verdict should stand. This Court believes that the verdict should stand. If plaintiff's theory of the case is correct, then there is substantial evidence to warrant the verdict returned by the jury, both

against defendant and the third party defendant. The weight of the evidence favored plaintiff. This Court does not understand that there is any contention that the damages were excessive. In my opinion, the damages awarded by the jury were reasonable under the evidence.

United States Steel Corporation, third party defendant, filed no post-trial motions. What has been said and held in this opinion is not in anywise intended to exonerate Steel from its own contributing negligence which was glaring. It is, of course, liable in contribution, but with limitations, however, because it was the employer of the decedent.

This is the opinion mentioned in my order of May 27, 1966.

cc: Edward J. Balzarini, Esq., 3113 Grant Bldg., Pgh. 19
Ira Hill, Esq., 747 Union Trust Bldg., Pgh. 19
John David Rhodes, Esq., 1524 Frick Bldg., Pgh. 19.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16038

JOHN P. COYNE, Administrator of the Estate of Donald William Powell, Sr., deceased,
Plaintiff-Appellee,

v.

JOHN MOHR & SONS, INC., a Corporation,
Defendant and Third-Party
Plaintiff-Appellant,

v.

UNITED STATES STEEL CORPORATION,
Third-Party Defendant.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued November 28, 1966

Before Smith, Freedman and Seitz, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 3, 1967)

By SEITZ, *Circuit Judge.*

This is an appeal by defendant John Mohr & Sons, Inc. from a judgment entered upon a jury verdict of $95,000.00

in favor of plaintiff in a Wrongful Death and Survival action based on diversity jurisdiction and governed by the substantive law of Pennsylvania. The first issue is whether defendant in its contract with the United States Steel Corporation (Steel) here assumed a duty to provide for the safety of plaintiff's decedent who met his death while working under the direction of Steel's American Bridge Division ("Bridge"). Steel was not sued by plaintiff and does not appeal from the verdict against it as third-party defendant for contribution as limited by law.

Most of the pertinent facts are not in dispute. In connection with its decision to erect a blast furnace Steel entered into a contract with defendant on September 20, 1960. Under this contract defendant was to be the prime contractor for the erection of the furnace itself and many of the auxiliaries including a slag pit to be equipped with a water system for spraying and cooling the molten slag as it emerged from the smelting process. Steel also negotiated a contract directly with another firm primarily for foundations, but reserved for its own Bridge Division the construction of a bag filterhouse for the removal of dust from the ore.

Bridge's construction of the filterhouse required the use of a large "3900" crane with a 120 foot boom. To prevent the crane's Caterpillar treads from becoming mired in the slag pit which had to be traversed, Bridge constructed a ramp from 2½ ton wooden mats laid in place with a smaller "3500" crane having only an 80 foot boom. Even with its boom mounted in the body of the crane six or seven feet off the ground and extended straight up, this "3500" model could not come closer to the high tension wires 104 feet overhead than the minimum distance of 17 feet required to prevent arcing of electricity to the ground.

Although a matter of central controversy during the trial, in light of the jury's verdict we accept plaintiff's contention that defendant requested that certain of the mats be removed to enable defendant to work on the water system. After defendant finished its work in the pit unobstructed by the mats which Bridge had removed with the "3500" crane, Bridge on August 21, 1962 started moving the mats back into position again as instructed by Steel's engineer. However, instead of using a "3500" crane, Bridge, this time used its "3900" crane. Although the boom on this crane could have been shortened, it was fully extended 120 feet. As plaintiff's decedent, an employee of Steel's Bridge Division, was disconnecting the hook on the crane cable from a ring on the side of one of the wooden mats current jumped from the wires to the boom only eleven feet away and ran down the cable electrocuting him.

Both sides recognize that defendant owed plaintiff's decedent no duty to warn of the danger or otherwise provide for his safety apart from the contract between Steel and defendant. But it is plaintiff's position, adopted by the court below, that under section 16 of the contract defendant assumed the sole responsibility for the safety of all persons engaged in work for defendant's benefit. Defendant argues, in contrast, that its duties under section 16 were limited to providing for the safety of persons in connection with work assigned to it under the contract.

Examination of section 16 of the contract[1] reveals three paragraphs which must be construed together. The first

[1] Section 16 provides as follows:

"16. The safety of all persons employed by Contractor and his subcontractors on Owner's premises, or any other person who enters upon Owner's premises for reasons relating to this contract, shall be the sole responsibility of Contractor. Contractor shall at all times maintain good

(Footnote continued on following page)

paragraph provides that defendant shall bear the sole responsibility for the safety of all persons on Steel's premises "for reasons relating to this contract". Plaintiff's decedent was not such a person because the laying of the mats was Bridge's task made necessary originally in order to construct the filterhouse. Nor does the finding, that at the time of the accident the mats were being restored to the position occupied prior to removal at defendant's request, necessitate the conclusion that plaintiff's decedent was on the premises *for reasons related to defendant's contract.* Defendant had no authority or control over the moving of the mats.[2] In these circumstances it is impossible to accept plaintiff's contention that simply because defendant requested the removal of an obstacle to its work it thereby

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(Footnote continued from preceding page)

order among his employees and shall not employ on the work any unfit person or anyone not skilled in the work assigned to him. Contractor shall confine his employees and all other persons who come onto Owner's premises at Contractor's request or for reasons relating to this contract and his equipment to that portion of Owner's premises where the work under this contract is to be performed or to roads leading to and from such work sites, and to any other area which Owner may permit Contractor to use.

"Contractor shall take all reasonable measures and precautions at all times to prevent injuries to or the death of any of his employees or any other person who enters upon Owner's premises. Such measures and precautions shall include, but shall not be limited to, all safeguards and warnings necessary to protect workmen and others against any conditions on Owner's premises which could be dangerous and to prevent accidents of any kind whenever work is being performed in proximity to any moving or operating machinery, equipment or facilities whether such machinery, equipment or facilities are the property of or are being operated by, the Contractor, his subcontractors, the Owner or other persons.

"It is understood that if employees of Owner shall perform any acts for the purpose of discharging the responsibility undertaken by the Contractor in this Article 16, whether requested to perform such acts by the Contractor or not, such employees of the Owner while performing such acts shall be considered the agents and servants of the Contractor subject to the exclusive control of the Contractor."

[2] The court below so held, stating that the issue was not disputed by plaintiff who wished to avoid a possible conclusion that a statutory employment relationship existed between decedent and defendant. This holding that defendant lacked control is further buttressed by the contract specifications granting Steel exclusive authority to integrate and coordinate the construction operations.

accepted responsibility for the safety of persons who are on the premises to engage in activity assigned to other contractors or reserved by Steel for itself or for its Bridge Division. Rather, this paragraph appears to require defendant to provide for the safety of all persons who are on the premises to engage in activity assigned to defendant under the contract regardless of what they might be doing or where they might happen to be. Indeed, the first paragraph expressly requires defendant to confine its employees and equipment to its own work area.

The second paragraph provides that defendant shall take precautions to prevent the death of its employees "or any other person who enters upon Owner's premises". Plaintiff contends that under this paragraph he "would be entitled to recover even if the decedent had been killed while engaged in Steel's work".[3] However, we cannot hold that defendant by the second paragraph has undertaken duties to provide for the safety of all persons like decedent even though both their presence and their injury are traceable to activity other than that assigned to defendant and over which defendant has no authority or control. Rather, it seems clear that the second paragraph requires defendant to take precautions for the safety of all persons, whoever they might be or for whatever purpose they are on the premises, who might be injured as a result of defendant's activity.

The third paragraph does not alter our interpretation of the first two paragraphs of section 16 of the contract that defendant assumes no responsibility for the safety of persons such as decedent who are neither on the premises to engage in activity assigned to defendant nor injured as a

[3] Since we have concluded that decedent was in fact killed while engaged in activity reserved to Steel, we consider the merits of this proposition even though it is arguable that plaintiff conceded its invalidity in the court below.

result of such activity. This paragraph states that employees of Steel who perform safety responsibilities assigned to defendant are the latter's agents for such purposes. Nowhere in the contract is it declared that defendant is responsible for the safety of Steel's or any other company's employees who may be injured as a result of activity other than that assigned to defendant.

Our construction of the contract, under which defendant assumed no responsibility for decedent's death in the circumstances of this case, finds support in Farmers State Bank of Valparaiso v. Dravo Corp., 321 F. 2d 38 (7th Cir. 1963). The court there construed a practically identical Steel contract and held that it imposed no duty on the contractor toward the decedent who likewise met his death while engaged in activity reserved for Bridge.

Plaintiff attempts to distinguish the *Dravo* case by pointing out that there the contractor under the express terms of the contract owed a duty to provide for the safety only of persons on the premises for reasons relating to the contract. Here, in contrast, paragraph 2 imposes a duty toward all persons. However, as previously indicated that duty toward all persons exists only where it is defendant's activity which creates the danger. Where the contractor's activity is not involved "we find no basis for a construction of the contract which would result in [the contractor's] warranting U. S. Steel against Steel's own unlawful act, negligence or default". Farmers State Bank of Valparaiso v. Dravo Corp., 321 F. 2d 38, 41 (7th Cir. 1963).

For the first time on appeal plaintiff argues that the laying of the mats was assigned to defendant and that consequently defendant was responsible for decedent's death under paragraph 1. Plaintiff relies upon the specifications incorporated into the contract which provide that defend-

ant shall "furnish, install and later remove all temporary roads required for use during construction". However, such a provision when read together with the entire contract obviously refers to roadways required in connection with construction assigned to defendant. Our independent review of the record discloses no evidence whatsoever that defendant had any responsibility or authority with respect to the temporary mat runway leading to the filterhouse under construction by Bridge, even if that runway was a "road" within the meaning of the specification.

We have considered plaintiff's other arguments and find that they cannot support the judgment below. Our disposition of the case makes it unnecessary to consider other issues posed by defendant.

The judgment of the District Court is reversed with instructions to enter judgment for defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,038.

JOHN P. COYNE, Administrator of the Estate of Donald William Powell, Jr., deceased,

vs.

DUQUESNE LIGHT COMPANY, a corporation,

vs.

JOHN MOHR & SONS, INC., a Corporation,
Appellant,

vs.

UNITED STATES STEEL CORPORATION.

(D. C. Civil No. 63—333)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: Smith, Freedman and Seitz, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 12, 1966, be, and the same is hereby reversed, with costs, and the cause is remanded with in-

structions to enter judgment for defendant, John Mohr & Sons, Inc.

Attest:

February 3, 1967.

THOMAS F. QUINN,
Clerk.

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,038

JOHN P. COYNE, Administrator of the Estate of Donald William Powell, Jr., deceased,
Plaintiff-Appellee,

v.

JOHN MOHR & SONS, INC., a corporation,
Defendant and Third Party Plaintiff-Appellant,

v.

UNITED STATES STEEL CORPORATION,
Third Party Defendant.

SUR PETITION FOR REHEARING

Present: Chief Judge Austin L. Staley and Circuit Judges, McLaughlin, Hastie, Smith, Freedman and Seitz.

The petition for rehearing filed by John P. Coyne, Administrator of the Estate of Donald William Powell, Sr., deceased, Plaintiff-Appellee, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges on the circuit in regular

active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

Dated: March 13, 1967.

By the Court,

/s/ COLLINS J. SEITZ,
Judge.